



## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

#### **29 CFR Parts 2550, 2560, and 2570**

#### **RIN 1210-AB64**

#### **Amendment and Restatement of Voluntary Fiduciary Correction Program**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Proposed program amendments and amendments to prohibited transaction exemption; reopening of comment period.

**SUMMARY:** This document reopens the comment period with respect to amendments to the Voluntary Fiduciary Correction Program (VFC Program or Program) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and to the proposed amendment to Prohibited Transaction Exemption 2002-51 (PTE 2002-51), both published in the Federal Register on November 21, 2022. The Employee Benefits Security Administration (EBSA) published the modifications to the Program and a proposed amendment to PTE 2002-51 to both simplify and expand the original VFC Program, and solicited comment from interested persons by January 20, 2023. On December 29, 2022, the Consolidated Appropriations Act, 2023, which includes a provision pertaining to the VFC Program, was signed into law. The Department is reopening the comment period to allow commenters to address any issues raised by the new statutory provision.

**DATES:** The comment periods for the documents published on November 21, 2022, at 87 FR 70753 and 87 FR 71164, are reopened. Written comments should be submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

The Department will notify the public of the availability of the amended and restated VFC Program in a subsequent Federal Register document. The Department will also publish any final amendments to PTE 2002-51 in a subsequent Federal Register document.

**ADDRESSES:** You may submit written comments, identified by RIN 1210-AB64, to one of the following addresses:

- Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.
- Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Amendment and Restatement of Voluntary Fiduciary Correction Program.

*Instructions:* Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge online at [www.regulations.gov](http://www.regulations.gov), at [www.dol.gov/agencies/ebsa](http://www.dol.gov/agencies/ebsa), and at the Public Disclosure Room, EBSA, U.S. Department of Labor, Suite N-1513, 200 Constitution Avenue NW, Washington, DC 20210.

*Warning:* Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and can be retrieved by most internet search engines.

**FOR FURTHER INFORMATION CONTACT:** Yolanda R. Wartenberg, Office of Regulations and Interpretations, EBSA, (202) 693-8500, for questions regarding the VFC Program amendments in this document; Susan Wilker, Office of Exemption Determinations, EBSA, (202) 693-8540, for questions regarding the proposed amendments to the associated class exemption PTE 2002-51; and James Butikofer, Office of Research and Analysis, EBSA, (202) 693-8410, for questions regarding the regulatory impact analysis. (These are not toll-free numbers.)

For general questions regarding the VFC Program: contact Dawn Miatech-Plaska, Office of Enforcement, EBSA, (202) 693-8691. For questions regarding specific applications and self-

corrections under the VFC Program, contact the appropriate EBSA Regional Office listed in Appendix C of the document at 87 FR 71164 (Nov. 21, 2022). (These are not toll-free numbers.)

Customer Service Information: Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department’s website ([www.dol.gov/ebsa](http://www.dol.gov/ebsa)).

**SUPPLEMENTARY INFORMATION:** The Department of Labor’s (Department) authority to establish the Voluntary Fiduciary Correction Program (VFC Program or Program) derives from its authority to enforce the fiduciary standards in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2) and 1132(a)(5), and thereby to establish policies on how this authority will be implemented. The Department also has the authority under section 408(a) of ERISA (29 U.S.C. 1108) to issue exemptions from the prohibited transaction rules in sections 406 and 407 of ERISA (29 U.S.C. 1106 and 1107) and in section 4975 of the Internal Revenue Code (Code).<sup>1</sup>

The Employee Benefits Security Administration (EBSA) originally adopted the VFC Program in 2002, and later revised it in 2005 and 2006.<sup>2</sup> EBSA designed the VFC Program to encourage employers and plan fiduciaries to voluntarily comply with ERISA and allow those potentially liable for certain specified fiduciary breaches under ERISA to voluntarily apply for relief from civil enforcement actions and certain civil penalties, provided they meet the Program’s criteria and follow the procedures outlined in the Program. Based on a review of the current VFC Program, the Department concluded that certain revisions to the Program would facilitate more efficient and less costly corrections of fiduciary breaches under the Program, encourage greater participation in the Program, and respond to requests from stakeholders for

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<sup>1</sup> Under Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 237 (2012), the authority of the Secretary of Treasury to issue exemptions pursuant to section 4975 of the Internal Revenue Code was transferred, with certain exceptions not relevant here, to the Secretary of Labor.

<sup>2</sup> 70 FR 17516 (Apr. 6, 2005), 71 FR 20262 (April 19, 2006).

adjustments based on their experiences using the Program. Accordingly, on November 21, 2022, the Department published in the **Federal Register** an amended and restated VFC Program.<sup>3</sup> On the same date, EBSA also published a proposed amendment to PTE 2002–51, the Program’s associated class exemption, to make certain conforming amendments to the class exemption.<sup>4</sup> The Department solicited general comment on any aspect of the VFC Program, including the amendments being announced, and furthermore expressed particular interest in public comments on whether there are other circumstances in which the VFC Program could be integrated with corrections under the Voluntary Correction Program of the Internal Revenue Service’s Employee Plans Compliance Resolution System (EPCRS). The Department requested that comments on the amended and restated VFC Program be submitted on or before January 20, 2023. For a more comprehensive discussion of the VFC Program, please see 87 FR 71164.

H.R. 2617, Consolidated Appropriations Act, 2023 (CAA) was signed into law on December 29, 2022. CAA includes a number of provisions related to retirement and other types of plans in Division T, which is also cited as SECURE 2.0 Act of 2022 (SECURE 2.0). Section 305 of SECURE 2.0 provides for expansion of EPCRS to cover any “eligible inadvertent failure.” The term “eligible inadvertent failure” as defined in section 305(e) generally includes a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards and is not egregious, related to the diversion or misuse of plan assets, or related to an abusive tax avoidance transaction. Section 305(b) specifically provides for correction of an “eligible inadvertent failure” relating to a loan from a plan to a participant, and furthermore indicates that the Department shall treat any such loan failures self-corrected in accordance with applicable requirements as meeting the requirements of the VFC Program, although the Department may impose reporting or other procedural requirements. Section 305(g) contemplates the issuance of

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<sup>3</sup> 87 FR 71164 (Nov. 21, 2022).

<sup>4</sup> 87 FR 70753 (Nov. 21, 2022).

further guidance by the Department of Treasury (“Treasury”) on EPCRS to take into account the provisions of section 305.

Given the general effect of section 305 of SECURE 2.0 on EPCRS and the specific references to the VFC Program in connection with corrected loans to participants, the Department is reopening for 60 days the period for submitting comments on the amended and restated VFC Program and proposed amendment to PTE 2002-51.<sup>5</sup> The Department is interested in comments on what revisions, if any, should be made to the VFC Program to reflect the treatment of corrections of loans to participants as described in SECURE 2.0 section 305(b). Specifically, how should the VFC Program be modified in the future to implement the new deeming provision in SECURE 2.0 section 305(b)(2) (“the Secretary of Labor shall treat any such failure which is so self-corrected under subsection (a) as meeting the requirements of the Voluntary Fiduciary Correction Program of the Department of Labor if ....”)? For example, should Section 7.3 be amended to include a specific paragraph treating items self-corrected under EPCRS as meeting the requirements of the VFC Program? In addition, should the VFC Program impose additional reporting or other procedural requirements for these specific corrections, and why? Are changes needed to PTE 2002-51 to implement SECURE 2.0 section 305(b)(2)? The Department is interested in comments that address these and related issues. The Department also is interested more generally in any other aspects of section 305 as it affects EPCRS that should be taken into account by the Department in making further revisions to the VFC Program and PTE 2002-51.

Signed at Washington, DC this 1st day of February, 2023.

Lisa M. Gomez,  
Assistant Secretary, Employee Benefits Security Administration, Department of Labor.  
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<sup>5</sup> The Department has advised Treasury of the reopening of this comment period, and the Department understands that Treasury and the Internal Revenue Service intend to review comments submitted to the Department (as well as other stakeholder input) in developing updates to EPCRS with respect to section 305 of SECURE 2.0. The Department will forward to Treasury comments as they are received.